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No. 85-351

In the Supreme Court of the United States

October Term, 1985

CHARLES H. GRUBB,

Respondent,

v.

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of this Court's recent decision in *Anderson* v. *City of Bessemer City, North Carolina*, did the Court of Appeals correctly affirm the District Court's finding of fact that petitioner intentionally discriminated against respondent due to respondent's race?

2. Did the Court of Appeals correctly affirm the District Court's backpay award, inasmuch as petitioner never offered a job to respondent, petitioner failed to preserve the issue of mitigation for review or to present evidence related to mitigation at trial, and the District Court offset from the award all amounts respondent earned or could have earned in a subsequent non-equivalent job?

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Respondent Charles H. Grubb respectfully requests that this Court deny the Petition for Writ of Certiorari brought by W.A. Foote Memorial Hospital, Inc. seeking review of the Judgment of the United States Court of Appeals for the Sixth Circuit entered on April 16, 1985.

STATEMENT OF THE CASE

A. Introduction

Because the Petition before this Court is a challenge to the correctness of the District Court's factual finding of intentional race discrimination, and a challenge to the Court of Appeals' affirmance thereof, respondent believes it imperative that he clarify petitioner's selectively narrow statement of the case and record below.

This is an employment discrimination case which has been pending in the federal courts since February 16, 1979 when Mr. Charles H. Grubb, a black man, filed a complaint alleging that his former employer, W.A. Foote Memorial Hospital, Inc.,[1] discharged him due to his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* ("Title VII").[2]

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[1] Petitioner will hereinafter be referred to as "Foote," "Foote East," "Foote West" or "the hospital."

[2] Grubb also charged Foote with unlawful race discrimination in violation of the Civil Rights Act of 1870, 42 U.S.C. §1981 ("§1981") and the Michigan Elliott-Larsen Civil Rights Act of 1977, M.C.L. 37.2101 *et seq.* ("Elliott-Larsen"). Grubb also alleged unlawful age discrimination in violation of the Age Discrimination In Employment Act of 1967, as amended, 29 U.S.C. §§621 *et seq.* ("ADEA"), and the Michigan Elliott-Larsen Civil Rights Act. Finally, Grubb alleged breach of an implied contract of employment pursuant to the Michigan common law doctrine set forth by the Michigan Supreme Court in *Toussaint* v. *Blue Cross and Blue Shield of Michigan*, 408 Mich. 579 (1980). (Joint Appendix, Vol. II, at 375-88.) (The Joint Appendix, as referenced herein and by the hospital in its Petition (at 14), is the record of the trial court filed by both parties in the Sixth Circuit. It will be identified herein as "J.App.")

When Justice O'Connor observed in *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 221 (1982), that the "extended time it frequently requires to obtain satisfaction in the courts" is especially unfortunate for the job discrimination victim who "cannot afford to stand aside while the wheels of justice grind slowly toward the ultimate resolution of the lawsuit," she could have been describing this case. It is now over eight years since the hospital fired Mr. Grubb because, as its decision-maker explained: "No black guy should be a boss over white women." During many of these years, the United States District Court for the Eastern District of Michigan and thereafter the Sixth Circuit subjected this case to a most exhaustive and exacting scrutiny.

"Court delays, of course, affect all litigants." *Ford*, *supra*, 458 U.S. at 221. Yet, the degree to which this case has been reviewed is ironic, given its straightforward nature. This case does not involve a novel or complex issue. The questions presented are not the subject of conflicting opinions in the various Courts of Appeals nor are they of significance to the administration of federal anti-discrimination laws. Indeed, the questions presented are *factual*, rather than *legal*, in character.

The ultimate factual issue the District Court decided was, quite simply, whether the hospital's decision-maker, Willard Carl, brought about Mr. Grubb's discharge by reversing the staffing recommendations of a study committee and selecting Mr. Grubb's job for elimination (as opposed to selecting the job held by a white employee) due to Mr. Grubb's race. After a five day bench trial, in which the District Court heard the testimony of many witnesses and accepted into the record hundreds of pages of documentary evidence, the District Court issued an opinion and order granting judgment in favor of respondent. *See* 533 F. Supp. 671 (E.D. Mich. 1981); Pet.

App. A.[3] By carefully weighing the credibility of each witness and reviewing the documentary evidence, the District Court found that the hospital had indeed discharged Mr. Grubb due to his race. It did exactly what it is that a District Court, sitting as the ultimate finder of fact, is supposed to do: decide whether the employer has engaged in intentional employment discrimination.

Mr. Grubb respectfully submits that there is no reason for this Court to grant the hospital's Petition, which the hospital itself conceded is based upon "reasonable surmise" (Pet. at 15). In essence, the hospital requests not only that this Court displace the District Court as the fact-finder, but also that this Court admonish the Sixth Circuit for refusing to do that very thing. The Petition should not be granted because the Sixth Circuit properly affirmed the District Court's judgment in accordance with the standard recently announced by this Court in *Anderson* v. *City of Bessemer City, North Carolina*, 470 U.S.____, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

B. Factual and Procedural Background

In 1956, Grubb obtained a job in the laundry department of Sisters of Mercy Hospital ("Mercy") in Jackson, Michigan (J. App. 270-271). Although his initial job at Mercy was to pick up soiled linen (J. App. 272), by 1961 he had been promoted to the position of Laundry Manager. For two decades he enjoyed the support and respect of the Mercy administration (J. App. 279–280), and was acknowledged to be an accomplished professional in his field. 533 F. Supp. at 675; Pet. App. A-8.

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[3] References herein to "Pet. App." refer to the Appendix to the Petition for Certiorari.

As the Laundry Manager, he was assisted by Ms. Rosella Fountain, a white employee, whom he was instrumental in promoting through the ranks to the position of department supervisor (J. App.282). Fountain reported to Grubb and worked under his supervision and direction for 16 years (J. App. 280-281).

In September 1975, petitioner purchased Mercy, which became known as "Foote West," with the existing Foote facility becoming known as "Foote East" (J. App. 33). Petitioner eventually consolidated the staff and equipment of the two laundry facilities. Prior to this consolidation, the laundries ran independently with Willard Carl serving as the Laundry Manager at Foote East and Grubb serving as the Laundry Manager at Foote West (J. App. 283). Fountain remained the supervisor at Foote West where she continued to be Grubb's assistant (J. App. 284).

On December 1, 1975 Arthur Kneuppel, the hospital's president, selected a "Laundry Committee" composed of individuals he considered to be the most knowledgeable about laundry operations (J. App. 65). He appointed Grubb, Carl, and others to the Committee and requested that the Committee recommend a blueprint for consolidating the two laundry facilities (J. App. 64-66, 603).

On December 18, 1975 the Committee submitted a written report to the president (J. App. 66, 603) which recommended that the laundry facilities and staff at East and West be consolidated and centralized at East (J. App. 603). The report specifically recommended that the position of Laundry Supervisor (a position which existed only at Mercy and which was held by Fountain) be eliminated. The report also recommended that the management staff of the consolidated la ndry consist of one laundry manager and one assistant laundry manager (J. App. 66-69, 284-285, 603).

Grubb testified that as a result of the Committee report he believed and understood that he would be retained in the consolidated laundry operation in the position of Assistant Department Head (J. App. 285), i.e., assistant laundry manager. In fact, the hospital implemented many of the Laundry Committee's recommendations. Most pertinently, on April 4, 1976 the hospital's president appointed Grubb to the position of Assistant Department Head (J. App. 71-72, 783). The president also appointed Carl the Department Head of the consolidated laundry (J. App. 72). At the time, the laundry supervisor's position, held by Fountain, was not eliminated as recommended.

The hospital stipulated during trial that Grubb was qualified to hold every managerial position in the laundry (J. App. 781). Harold Petke (one of the hospital's Associate Administrators and Carl's immediate supervisor), who was familiar with Grubb's job performance at both Mercy and later at Foote, stated in an evaluation that Grubb "demonstrates exceptional technical and professional competence in all aspects of his work . . . and should be continued as a laundry manager" (J. App. 102-103). Thus, as both the District Court and the Sixth Circuit found, "[t]here [was] no dispute that during those years Mr. Grubb was an exemplary employee . . . qualified for the position of supervisor of the laundry," 533 F. Supp. at 673; Pet. App. A-3, whose "entire work record has shown an industry and determination to 'get ahead in the world' which one may rightly deem admirable." 741 F.2d at 1489; Pet. App. E-3.

Once Carl obtained supervisory power over Grubb, he proceeded to exercise his authority in a belittling, arbitrary and racially discriminatory fashion. He arranged for the termination of Grubb's employment; he also arranged for Grubb to be humiliated in the process.

Sometime before February 1977, Carl decided to fire Grubb. He ignored the staffing recommendations of the Laundry Committee and on his own initiative (J. App. 110) decided to eliminate Grubb's position rather than the position held by Fountain, the white employee (J. App. 45-47, 50-51, 220). Carl was able to do so by drafting a budget which reduced by one job the three existing supervisory staff positions in the consolidated laundry (J. App. 46-47, 49-50, 220). Carl's immediate supervisor, Petke, testified that the idea of eliminating the position held by Grubb originated with Carl (J. App. 110) who tried unsuccessfully to get Petke himself to eliminate Grubb's position (J. App. 291).

After Carl drafted a budget which eliminated Grubb's position, Petke asked him how he intended to fill the remaining supervisory staff position (J. App. 47-48). Carl told Petke that he had not yet decided, but would eventually do so based upon an "evaluation" of Grubb and Fountain, the two candidates for the position (J. App. 41-49). Carl's alleged "evaluation system" became the "articulated legitimate nondiscriminatory reason"[4] offered by the hospital at trial to explain Grubb's discharge. After Carl had selected Fountain for retention and Grubb for elimination (J. App. 228-230), he reported to Petke that he had "*compared both individuals using those criteria and Rosella Fountain came up higher*" (J. App. 55).

Although the hospital articulated this reason, the District Court found that Grubb had carried his ultimate "burden of persuasion" by proving, through both circumstantial and direct evidence, that the hospital's "criteria" were a pretext for intentional discrimination. The record established that *Carl never applied his criteria to Grubb*. In fact, at trial, the hospital

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[4] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981); *U.S. Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711, 714 (1982).

was unable consistently to state the criteria in Carl's "evaluation system." According to Petke's testimony, Carl told him that his "evaluation system" contained six factors including the factor "working with the women directly" (J. App. 51). In contrast, Carl testified that he applied only three criteria to make the decision between Grubb and Fountain (J. App. 246-247); and, Carl admitted at trial that the "evaluation system" he employed contained factors different from those he identified in his deposition and different from those he told Petke that he had used (J. App. 233-236). What is more, during discovery the hospital claimed that the decision between Fountain and Grubb was made solely on the basis of seniority (J. App. 115-148) and in accordance with its personnel policy (J. App. 598). All of this evidence of "pretext" was presented to the District Court.

The hospital's "articulated reason" for the decision to fire Grubb, and each version of the criteria purportedly developed and applied by Carl in reaching his decision to fire Grubb, stand in stark contrast to Carl's own admissions at trial that: (1) he did not know whether Grubb had the ability or qualifications to meet the "criteria" he purportedly had devised (J. App. 233-234, 252); (2) he never asked Grubb if he could do or wanted the job (J. App. 236); and, most strikingly, (3) *he never applied his "criteria" to Grubb* (J. App. 251-252).

It was in the context of this collapsed offering of an "articulated reason" for Grubb's discharge — in conjunction with the hospital's admissions that Grubb was an employee of "exceptional technical or professional confidence in all aspects of his work" (J. App. 102-103) who was qualified for all managerial positions in the laundry (J. App. 781) — that the District Court found persuasive the following direct evidence that Grubb was discharged due to his race, and as a result of Carl's racial bias.

Beginning in March 1976 and continuing up to the very day of his discharge, Carl mounted against Grubb a campaign of humiliation. Carl tried to get Grubb to fire, for no lawful or apparently legitimate reason, three minority laundry workers. When Grubb refused to carry out Carl's demand, because the minority employees had done nothing to warrant discharge (J. App. 298), Carl sought to denigrate and embarrass Grubb by calling these employees "niggers," and saying to Grubb: "*When are you going to fire those niggers.*" (J. App. 298.)

Grubb testified that he was initially "so shocked that a man of Carl's stature would say that to me, I couldn't answer" (J. App. 298). Grubb testified that "nigger" was a term "ladies and gentlemen don't use" (J. App. 299). "That was wrong. You don't go out and call people that." (J. App. 298.) "I never considered myself one and I am glad I am not, but it's just something that nobody wants to be and I can't see anyone trying to make me be. . . ." (J. App. 299.)

Grubb advised Carl that black people "don't like to be called [niggers]"; to which Carl responded: "I don't care what they like to be called." (J. App. 298.) This testimony was specifically credited by the District Court as evidence of racial animus.

The hospital now requests that this Court grant its Petition for the purpose of reversing this credibility determination of the District Court. The hospital claims that the District Court gave too much weight to this racial slur because "it is doubtful that the court gave any serious consideration to the *undisputed and highly credible* testimony of. . . Lurlene Osborne" (Pet. at 15–16; emphasis added). The reality is to the contrary. Ms. Osborne was one of the minority employees who were the subject of Carl's epithet. The record established that the District Court was very interested in Osborne's testimony. Grubb testified that after Carl asked him "when are you going to fire

those niggers," he told Osborne that Carl was out to fire her (J. App. 327) and that Carl had used derogatory language in saying so (J. App. 299). On questioning from the District Court, Osborne *confirmed* Grubb's testimony:

> THE COURT: I would like to ask a question. *Do you recall Mr. Grubb having told you of derogatory remarks that Mr. Karl [sic] made about you?*
>
> MR. OSBORNE: *Yes.*
>
> THE COURT: And can you tell when that occurred, approximately?
>
> MS. OSBORNE: That was after we merged.
>
> THE COURT: But it was while Mr. Grubb was still with the hospital?
>
> MS. OSBORNE: *Yes. Mr. Grubb told me that Mr. Karl [sic] had told him that he should get rid of me. . . .*

J. App. 360–361; emphasis added.

Although Grubb was the Assistant Department Head, and was running the Foote West laundry, Carl chose to transmit his directives through Fountain rather than communicate with him directly (J. App. 288). Eventually, although Grubb had supervised Fountain for 16 years, Carl decided to upset this traditional reporting structure. One morning Carl advised Grubb that Fountain would henceforth report directly to him explaining to Grubb that: *"No black guy should be a boss over white women."* (J. App. 303.) The District Court also credited this as evidence of Carl's racial motive.

Petitioner now asserts that this Court should grant its Petition because Carl denied making this remark, and, in any case, because Fountain continued to report to Grubb. Petitioner's argument is disingenuous. This testimony was introduced to establish Carl's "state of mind." "The state of a man's mind is as much a fact as the state of his digestion."

U.S. Postal Service Board of Governors v. *Aikens*, 460 U.S. 711, 716 (1983). Carl was of the state of mind that black men should not supervise white women, and, as the District Court found, he eventually acted upon his racial beliefs by discharging Grubb. The fact that before he was fired Grubb continued to supervise Fountain is irrelevant. The issue was motivation and intent.

In addition, while Fountain reported to Grubb until both facilities were physically consolidated, Grubb also testified that Carl did effectuate what the District Court characterized as an "alteration in the line of authority," 533 F. Supp. at 674; Pet. App. A-4, by circumventing his supervision of the West facility:

> MR. GRUBB: [W]hat happened there is that Mr. Carl used to come over quite often but he wouldn't talk to me. He used to talk to Mrs. Fountain. He used to call on the telephone and talk to Miss Fountain but then she would come tell me so I never had much contact with him unless it was something that he wanted done right away, unless it was something like — once he came over and contacted me to try and take over for him but he was constantly in contact with Miss Fountain which was difficult for me to understand.
>
> * * *
>
> MR. GRUBB: I felt, as I had told you before, I felt left out. I didn't feel that we were dealing with each other on a manager to manager basis. I was ignored a lot. I was forgotten; I was placed in a predicament that caused me to be less than I was.
>
> * * *
>
> I came in one morning to work. I went to the office to see if there was anything special that I should do. You always

> check to see. You don't know what the night had done in a place like that and knowing there is nothing, I mean it is just normal things, I started out in the work room. He said to me, *"By the way, you report directly to me from now on. Miss Fountain will report directly to me from now on. No black guy should be a boss over white women."* That was a comment that disturbed me quite a bit. I had been over white women, they had been real ladies to me and real nice and there was no problem before whether she was white and whether I was black. We didn't believe that. The reason I don't believe that is that my mother was black and my father was white and to me, there was some of them in each one of us and when you put it together, you should really understand what it is.

J. App. 288, 303; emphasis added.

Carl's campaign of humiliation did not end here. Grubb was a man who cared deeply about his job which "represented the culmination of his life efforts." 533 F. Supp. at 676; Pet. App. A-8. Nevertheless, after Carl had made his decision, sometime before February 1977, to fire Grubb, he told Petke, Fountain and Culhane (the Corporate Director of Personnel) but he never told Grubb (J. App. 291-292) until July 8, 1977, the last day that Grubb was employed. On that day, Carl simply told Grubb: "You call this fired, or whatever you please. . . . You are done." (J. App. 291-292.)

During the five month interval between the time Carl decided to fire Grubb and had communicated his decision to others, and the day he actually told Grubb he was fired, Grubb became extremely anxious about his position. Rumors about his discharge were circulating back to him. These rumors, combined with Carl's treatment of him, predictably increased Grubb's anxiety. Although Grubb inquired about

the rumors, no one gave him an explanation (J. App. 291-292). As a result, Grubb was forced to suffer rumors of his pending termination for many months.

At trial, Carl was unable to offer *any* explanation for why he had failed to tell Grubb what he had told everyone else: that he had decided to fire Grubb. During trial, the District Court asked Carl why he had proceeded in this fashion, and Carl's response was indeed revealing:

> THE COURT: At some point you made a decision and you did not discuss it at that point with Mr. Grubb, is that correct?
>
> MR. CARL: Yes.
>
> THE COURT: Why would that have been?
>
> MR. CARL: I don't know. Several things I can remember, Your Honor. Mr. Grubb had pointed out to me verbally that he would be satisfied staying as laundry manager after consolidation. He didn't want to go anywhere else; he didn't want to do anything else. He was happy being laundry manager. In the new budget I did not have the laundry manager position.
>
> THE COURT: Well, you knew Mr. Grubb was interested, obviously, in the maintenance of that position?
>
> MR. CARL: Of the laundry manager, yes.
>
> THE COURT: Despite that, you made a judgment not to discuss the matter with him?
>
> MR. CARL: Evidently I didn't.
>
> THE COURT: Can you tell me why?
>
> MR. CARL: No, I really can't.

J. App. 257-258.

It was undisputed that Carl arranged a situation where for at least five months Mr. Grubb lived in constant fear that he would lose his job. Finally, having kept Grubb apart from the daily operations of the laundry by consigning him to oversee the closing of the laundry operation at Mercy, and having previously failed to advise Grubb of his imminent termination, Carl ordered Grubb's office converted into a lunchroom (J. App. 298). When Grubb returned he discovered that he no longer had an office (J. App. 288-289). This was the way Grubb first learned of his termination (J. App. 289). Grubb recalled: "Then I knew I had no office." (J. App. 290.) "There was no place for me to go. I wasn't questioned, I wasn't told anything." (J. App. 290.) "I was so hurt. I never been hurt like that before. It took me 60 years to get that job and they took it from me in six minutes. You just don't understand what that means." (J. App. 294.)

After five days of trial, in which the District Court heard the testimony and assessed the credibility of eight witnesses and reviewed hundreds of pages of documentary evidence, the court concluded that as a matter of "ultimate fact" the hospital had intentionally discriminated against Grubb due to his race. The District Court found that:

a. The decision as to which of two positions would be eliminated within the laundry where Grubb worked, ultimately rested with Carl;

b. Carl testified that he developed several criteria to determine whether to retain Grubb or Fountain the two employees that held the jobs Carl was considering;

c. Despite his testimony that he considered both Grubb and Fountain under the criteria he established, Carl admitted that he never applied the criteria to Grubb and did not make any attempt to determine whether Grubb could do the remaining job;

d. Carl told one of his superiors, long before he actually eliminated Grubb's position, that "there wasn't a place" for Grubb;

e. Carl exhibited animus toward Grubb because of Grubb's race;

f. Carl told Grubb to "fire them niggers" when referring to three black female subordinates who Carl wanted Grubb to fire because Carl believed they were union activists;

g. Carl altered the line of authority between Grubb and Fountain, and explained the reason to Grubb with the words: "A black man has no place supervising white women."

533 F. Supp. at 674; Pet. App. A-3-4.

The hospital appealed the District Court's finding of racial discrimination to the Sixth Circuit. On August 20, 1984, the judgment of the District Court was reversed by an opinion delivered by Senior Judge Weick, concurred in by Judge Welford, and dissented from by Judge Engel. 741 F.2d 1486; Pet. App. E 1-34 ("*Grubb I*").

Writing for the majority, Senior Judge Weick acknowledged that Grubb had established a *prima facie* case of race discrimination. 741 F.2d at 1493; Pet. App. E-13. However, Judge Weick asserted that the District Court placed too high a burden upon the hospital and gave "considerably greater weight to Grubb's testimony than was due." 741 F.2d at 1493-4; Pet. App. E-14. According to Judge Weick, even though the District Court specifically credited the testimony of Grubb, that evidence was *too weak* because "there is no other evidence in the record of racial bigotry on [Carl's] part." 741 F.2d at 1494; Pet. App. E-14. Judge Weick amazingly concluded that even though Carl may have referred to black

employees as "niggers," this was *weak* evidence of racially discriminatory animus because he wanted them discharged "*not because they were black* [emphasis in original], but because of their union activities, *albeit in a racially derogatory manner* [emphasis added]." 741 F.2d at 1497; Pet. App. E-21. And, even though the District Court found that Carl told Grubb that black men had no place supervising white women, that evidence of discriminatory animus was also too *weak* in Judge Weick's estimation to permit a finding of *racial* animus because "[e]ven if Carl told Mr. Grubb black men should not supervise white women, this statement had *no effect* on Grubb's position. . . ." 741 F.2d at 1497; App. E-22 (emphasis in original). According to Judge Weick, all of this credited direct evidence was insufficient to permit the District Court to conclude that "but for" Grubb's race, Carl would not have engineered his discharge.

On August 31, 1984 Grubb filed a petition for rehearing *en banc* of the panel's August 20, 1984 opinion. The petition was referred by the Sixth Circuit to the original hearing panel which, on April 16, 1985, vacated its earlier opinion and entered a judgment affirming the judgment of the District Court. 759 F.2d 546; Pet. App. F-1, H-1 ("*Grubb II*"). Judge Weick dissented.

REASONS FOR DENYING THE PETITION

A. The Court of Appeals' Decision Was Consistent With And Faithful To The Standard Of Appellate Review Announced By This Court In *Bessemer City*.

Respondent contends that the trial record was more than sufficient to support the trial court's conclusion that the hospital discharged Grubb because of his race. Respondent also contends that in *Grubb I*, Senior Judge Weick did exactly

what this Court in *Aikens* and *Bessemer City* stated a Court of Appeals may not do: he conducted "a *de novo* weighing of the evidence in the record." *Bessemer City*, *supra*, 84 L.Ed.2d at 529.[5] For Judge Weick, the bench trial was merely a "tryout on the road" and not "the main event." *Id.*

Dissenting in *Grubb I*, Judge Engel went to the heart of the problem:

> It is difficult enough to bring the reality of a complex human dispute such as this into the trial courtroom. It is even more difficult to reconstruct that reality from a transcript of the trial. It is this double removal from reality which makes the clearly erroneous rule so necessary a requirement of appellate review.
>
> * * *
>
> It is possible, in hindsight, to question the factual findings made by the trial judge. However it is beyond question, in my judgment, that she concluded that while Grubb had not proved discrimination on account of his age, he had proved that he had been discharged because of his race. *I think that there is substantial evidence, even in the majority opinion's summary of the evidence, to support this conclusion.*
>
> * * *
>
> In short, I have concluded from examining the record that *the issues in this appeal were primarily factual*, and that Judge Boyle's finding of racially discriminatory intent as a casual factor in Grubb's termination was not clearly erroneous. Likewise, while her conclusions might have been more artfully expressed, they left no doubt that she believed, upon the evidence, that but for his race, Grubb would have remained in the employ of the Hospital.

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[5] *See also Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982).

> With all due respect, it appears to me that *the majority has done no more than re-try this case upon the record on appeal and has reached a different though perhaps equally plausible result. This, in my opinion, it is not our function to do.*

741 F.2d at 1501, 1502, 1503; Pet. App. E-32, 33, 34 (emphasis added).

The panel's reversal in *Grubb II*, which affirmed the judgment of the District Court, followed *Bessemer City*, wherein this Court admonished:

> [The clearly erroneous] standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*" [citation omitted]. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the "factfinder's choice between them cannot be clearly erroneous."
>
> * * *
>
> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.
>
> * * *

> [W]hen a trial judge's finding is based on his decision to credit the testimony of one or two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

84 L.Ed.2d at 528-30.

In *Grubb II*, the Sixth Circuit (with Judge Weick dissenting) applied this standard of review in affirming the District Court:

> [T]he panel concludes that the issues with respect to Grubb's claim of racial discrimination are primarily factual and that the determinations made by the trial judge finding that plaintiff had been discharged because of racial discrimination are not clearly erroneous. In view of the completeness of the statement of facts, which is already published, a majority of the court believes that they are sufficient to support such a finding.

759 F.2d at 547; Pet. App. H-2.

To reverse the Sixth Circuit, which had before it such overwhelming evidence of discriminatory intent, and which faithfully applied the clearly erroneous standard as formulated in *Bessemer City*, would not advance the state of federal jurisprudence. Even if the Sixth Circuit's decision in *Grubb II* could somehow be distorted into a holding not in keeping with *Bessemer City* — which it cannot — that would still not be reason to grant the hospital's Petition. The Sixth Circuit simply *affirmed* a decision of the District Court which was itself not clearly erroneous.

It cannot be disputed that Grubb established a *prima facie* violation of Title VII. Even Judge Weick conceded as much in *Grubb I*. 741 F.2d at 1493; Pet. App. E-13. The hospital does not claim anything to the contrary in its Petition.

Once a plaintiff establishes a *prima facie* case in an employment discrimination suit, the defendant *must* present evidence in rebuttal. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981). However, even though the defendant need only "articulate" a reason for its conduct, *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978); *Board of Trustees of Keene State Collete* v. *Sweeney*, 439 U.S. 25 (1978), its production obligation is not a meaningless standard. As this Court stated in *Burdine*:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.

450 U.S. at 254-255.

Given the record in this case, and particularly the hospital's admissions that it did not equally apply its selection crieteria to both the black and white candidates, the hospital failed as a matter of law to carry its rebuttal burden. The hospital thus failed to articulate a legally sufficient explanation for Grubb's discharge.

But the evidence here was much stronger. In fact, it proceeded to the level of specificity required to establish that Grubb carried his ultimate burden of persuasion under *Burdine*. Grubb established that the hospital's articulated reason

(i.e., the "Carl evaluation system") was unworthy of credence; that it was a sham and a pretext for intentional discrimination. In addition, Grubb established through direct evidence — *viz.*, Carl's expressed racial hostility and bigotry directed at the hospital's black employees in general and at Grubb as it specifically related to the maintenance of his position — that the decision-maker acted with a purposeful intent to discriminate. The evidence was more than sufficient under *McDonnell Douglas*, *Sweeney*, *Furnco*, *Burdine* and *Aikens*, to support the District Court's ultimate factual finding of intentional discrimination. Regardless of the review standard applied by the Sixth Circuit, its affirmance of the District Court's factual finding was not error.

B. Inasmuch As The District Court Offset Respondent's Award By All Amounts He Could Have Earned In A Position That Was Not Substantially Equivalent, That Petitioner Never Offered Respondent Any Job And Never Raised The Issue Of A Failure To Mitigate At Trial, The Court of Appeals' Affirmance Of The District Court's Relief Order Did Not Conflict With *Ford Motor Co.* v. *EEOC.*

In ostensible reliance upon this Court's decision in *Ford Motor Co* v. *EEOC*, 458 U.S. 219 (1982), the hospital contends that the Court of Appeals erred by affirming the District Court's award of back and front pay to Grubb subsequent to the time he resigned a job he obtained following his discharge by the hospital. The hospital bases its argument upon two factual claims: First, that "Mr. Grubb voluntarily terminated his subsequent employment *for the sole purpose* of collecting Social Security" (Pet. at 19; emphasis added), and second, that "the intent of Mr. Grubb to remain unemployed *is beyond dispute*" (Pet. at 20; emphasis added).

Both factual assertions are false. The *only* testimony on this subject was that provided by Grubb, which is quoted in its entirety in the Petition (at 21). Grubb testified not just that continuation of employment with Jackson County would have resulted in reducing his Social Security benefits, but moreover that he "*wasn't making enough money for the requirements of the job*" (Pet. at 21; emphasis added).

Contrary to the hospital's assertion (Pet. at 20), the evidence did not establish that Grubb intended to remain unemployed. Grubb testified that he was able and willing to return to work with the hospital, and the District Court so found. 533 F. Supp. 676; Pet. App. A-9. In addition, the District Court correctly noted that the Social Security Act, 42 U.S.C. §403, contemplates that beneficiaries may continue to work after the election of benefits. Pet. App. B-2. Respondent is aware of no authority, and petitioner cites no authority, that such an election serves to terminate back pay entitlement under Title VII.

However, even if petitioner's characterization of the record had been accurate, its reading of *Ford Motor Co.* v. *EEOC* is flawed and its reliance thereon is misplaced. In *Ford* this Court held that an employer can toll its back pay liability under §706(g) of Title VII by "*unconditionally offering the claimant the job he sought.*" 458 U.S. at 232 (emphasis added). That holding is inapplicable here. The hospital never offered to Grubb, unconditionally or otherwise, the job from which he was discharged. It never offered him any job. Indeed, in 1979, two years after Grubb was discharged, Carl resigned his position with Foote, creating a vacancy in the laundry manager's position. Yet the hospital failed to offer the job to Grubb. 533 F. Supp. at 673; Pet. App. A-3.

Ford is also not applicable here because it only applies to positions which are "substantially equivalent." 458 U.S. at 232. After he was discharged by the hospital, Grubb sought to mitigate his damages by searching for employment. Although

he did not find a comparable position, he did accept a job with Jackson County. But, the Jackson County job paid Grubb only 65% of what he would have earned at Foote had he not been discharged, and only 71.2% of what he had earned at Foote a year earlier (J. App. 621). Positions with such disproportionate compensation are not "substantially equivalent." *Rasimas* v. *Michigan Dept. of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 2151 (1984). As a matter of law, Grubb's resignation from a non-equivalent position did not disenfranchise him from all future relief. "Claimants often take other lesser or dissimilar work during the pendency of their claims, even though doing so is not mandated by the statutory requirement that a claimant minimize damages or forfeit his right to compensation." *Ford*, *supra*, 458 U.S. at 231 n.14.

After his discharge Grubb searched for employment. At the age of 62, he went beyond what the law required: he accepted a non-comparable position. The purposes of Title VII are "to end discrimination" and, secondarily, "to compensate the victims for their injuries" by restoring them "'so far as possible. . . to a position where they would have been were it not for the unlawful discrimination.'" *Ford*, *supra*, 458 U.S. at 230, citing *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1972). Those purposes were served in *Ford*, this Court concluded, because unconditional offers of reinstatement to the job at issue would place "the victims of employment discrimination into the jobs they deserve as quickly as possible." 458 U.S. at 241. No such purpose, nor indeed any purpose of Title VII, would be served by depriving discrimination victims of relief because they left a job they never had to accept in the first place. Such a rule would encourage victims not to accept any job that was not substantially similar.

In any case, petitioner is here precluded from raising the issue of mitigation for it waived that issue at trial. While a Title VII plaintiff bears the burden to use reasonable efforts to

mitigate his damages *the burden is always on the defendant to prove a failure to mitigate. Rasimas, supra,* 714 F.2d at 623-624. Moreover, under Federal Rule of Civil Procedure 8(c), the defendant must plead failure to mitigate as an affirmative defense or the same is waived. *Camalier & Buckley-Madison, Inc.* v. *Madison Hotel, Inc., et al,* 513 F.2d 407, 420 n.92 (D.C. Cir. 1975). The hospital here failed to raise this defense at or before trial, and is accordingly barred from raising it now.

Even assuming that it did not waive the issue, the hospital failed to carry its burden to establish a failure to mitigate. Grubb testified that he left the job at Jackson County because he found the wages insufficient. It was undisputed that the Jackson County position paid substantially less in 1978 than he made in his position at Foote a year earlier. This was the *only* testimony regarding his reasons for resigning this position. The hospital pursued the matter no further. As the District Court noted, petitioner "had one full and fair opportunity at the trial to produce evidence of failure to mitigate" (J. App. 587).

In the final analysis, though, petitioner's argument is moot. Despite petitioner's failure to raise the issue, the District Court, on its own initiative, found a failure to mitigate and reduced Grubb's back and front pay awards accordingly. The District Court held in its Memorandum Opinion And Order On Damages (Pet. App. B-1) that:

> I find that amounts earnable at Jackson County were "amounts earnable with reasonable diligence by the person or persons discriminated against." 42 U.S.C. §2000e5(g). While the burden of proving a failure to mitigate rests on Defendant, I find that where, as here, Plaintiff's own proofs show that he secured and then terminated his subsequent position in order to receive social security benefits, the record supports a conclusion that

> Plaintiff failed to mitigate. Therefore amounts which Plaintiff could have earned had he continued in that employment must be deducted from the ultimate award.

Consequently, in both its back pay and front pay awards, the District Court *reduced* Grubb's damages by the amount of pay the District Court determined that Grubb would have earned had he remained in his job at Jackson County. Specifically, the District Court deducted $12,750.40, the amount it found he could have earned per year at Jackson County, from the amount of lost wages the District Court determined he suffered each year. It did so because of Grubb's purported failure to mitigate, despite the fact that the Jackson County job paid him substantially less than he would have earned with petitioner, and despite the fact that in September 1979, a year *after* Grubb left his job at Jackson County, the hospital's laundry manager position became vacant and the hospital failed to offer the job to Grubb. This failure, the District Court noted in its opinion, was a violation of the hosptial's applicable personnel policy. 533 F. Supp. at 673; Pet. App. A-3.

Because the hospital should have recalled Grubb in 1979, *after* he left the Jackson County job, he should not have had any amounts deducted from his backpay award after that date. Nevertheless, while the District Court found that Grubb had suffered an actual loss of $99,569.00 in wages, from the date of his termination to the date of judgment (Pet. App. D-1), it reduced this award by $41,880.00, the amount it found Grubb would have earned had he not resigned the Jackson County job. The same reduction was ordered for Grubb's front pay (Pet. App. D-4).

The hospital received every conceivable benefit of the District Court's mitigation decision. Not only were all wages actually earned by Grubb offset from his backpay award, but

"constructive" *non-earned* wages were also deducted. Mitigation is an issue of fact which, on appeal, is subject to the Rule 52(a) "clearly erroneous" standard of review. The District Court's mitigation ruling turned on the unique facts of this case. There is no sound reason for this Court to grant the Petition on this issue.

CONCLUSION

Mr. Grubb respectfully requests that the hospital's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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